These documents relate to the Dog Fouling (Scotland) Bill (SP Bill 55) as introduced in the
Scottish Parliament on 11 June 2002

DOG FOULING (SCOTLAND) BILL

EXPLANATORY NOTES
(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. The following documents are published to accompany the Dog Fouling (Scotland) Bill introduced in the Scottish Parliament on 11 June 2002:
   - Explanatory Notes;
   - a Financial Memorandum; and
   - the Presiding Officer’s Statement on legislative competence.

The Financial Memorandum and Presiding Officer’s statement are required under Rule 9.3 of the Parliament’s Standing Orders.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Non-Executive Bills Unit on behalf of Keith Harding, the member in charge of the Bill. They have been prepared in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

SUMMARY OF AND BACKGROUND TO THE BILL

4. Section 48 of the Civic Government (Scotland) Act 1982 (c.45) makes it an offence for a person to allow a dog to foul on certain specified land, including footpaths, pedestrian precincts and children’s play areas maintained by a local authority. The offence is committed irrespective of whether the excrement is immediately removed by the person in charge of the dog. Currently only the police are able to take action against offenders. In addition, there are no provisions to allow the offence to be dealt with by means of a fixed penalty notice.

5. The Bill has two principal aims. The first of these is to amend the offence of dog fouling so that the offence consists of failing to clear up after a dog rather than of allowing a dog to foul. The second principal aim is to establish new enforcement provisions in connection with the offence by enabling local authorities and police constables to issue fixed penalty notices to persons suspected of committing the offence.

6. Specifically the Bill:
   - makes it an offence for a person in charge of a dog, who, after allowing that dog to foul, fails to clear away and dispose of the excrement appropriately;
   - applies to all public places, including common passages, closes, courts, stairs, back greens and other similar areas subject to specified exceptions;
   - makes the offence of dog fouling an offence in respect of which the evidence of only one witness is sufficient;
   - provides local authority officers and police constables with the power to issue fixed penalty notices to anyone who they have reason to believe has committed an offence under the Bill;
   - provides that when a fixed penalty notice is issued it discharges any liability that the suspected offender has for conviction unless the suspected offender requests a hearing within 28 days of the notice being issued;
   - requires local authorities to authorise persons to have the power to issue fixed penalty notices;
• provides that failure either to pay a fixed penalty notice or to request a hearing within the 28 day period will result in the fixed penalty being increased by 50% and being enforceable as if it were a court decree.

COMMENTARY ON SECTIONS

Section 1: Offence

7. Subsection (1) provides that, subject to the exceptions in subsection (1)(a) and (b) if a person who is in charge of a dog that defecates on a place to which the Bill applies fails to immediately remove the dog’s faeces that person will be guilty of an offence.

8. There are two exceptions to this. The first, in subsection (1)(a), applies if the person has a reasonable excuse for failing to remove the faeces. An example could be if the dog had diarrhoea – in such a situation, the person may have tried their best to remove the faeces but failed to do so fully. Another example of a reasonable excuse could be if the act of removing the faeces would create a risk of causing injury to the person in charge of the dog or to others.

9. The second exception is in subsection (1)(b), which applies if each person who owns, occupies or otherwise has control over the land has given permission that persons in charge of dogs that defecate on that land do not need to remove the excrement. Where there is more than one owner, occupier or other person or authority having control of the place, all must consent to dog fouling before there is an exemption to the offence. A specific example of this would be in a situation where there was a tenant and a landlord; both would need to give their consent. Permission can be given generally or specifically. Thus, permission could be restricted to specific areas or times. Permission could also be given on an individual basis or in relation to all persons in charge of dogs that defecate on the land. By virtue of the definition of “owner” in section 15 a creditor in a heritable security who is not in possession of the security objects is not regarded as an owner.

10. Subsection (2) provides that any person found guilty of the offence will be liable on summary conviction to a fine not exceeding level 2 on the standard scale. Summary conviction occurs when criminal proceedings in respect of the offence are brought before the district or sheriff court (without a jury sitting) and the person has been found, or pleads guilty. The current level 2 fine is £500.

11. Subsection (3)(a) creates a presumption that a person who is ordinarily in possession of a dog is regarded as being in charge of that dog at any time. This means that individuals will not be able to evade prosecution by claiming that they were not in charge of a dog because it was not on a lead at the time. It also means that where there is a doubt or dispute as to who was in charge at the particular time the person normally in possession of the dog will be regarded as having been in charge unless that person can prove another person was in charge.

12. Subsection (3)(b) makes it clear that disposal of the faeces in a rubbish bin or a bin provided specially for the disposal of dog faeces is considered sufficient removal. The effect of subsection 3(c) is that the dog faeces must not be subsequently thrown, deposited or dropped onto any other place to which the Bill applies.
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13. Subsection (3)(d) provides that being unaware of the defecation or not having suitable means of removing the faeces are not considered to be reasonable excuses under section 1(a).

14. Subsection (4) provides that corroboration (evidence from two sources) is not required to convict someone of this offence. In practice this means that authorised officers and police constables will be able to operate alone rather than in pairs.

Section 2: Places to which Act applies

15. Subsection (1) applies the Bill to any public open place. Public open place is defined in subsection (3) and includes areas to which the public or a section of the public have access whether or not they are expressly or impliedly permitted to do so. The reference to a “section” of the public makes it clear that places which may be used by a special class of members of the public, rather than generally by the public are included as are places where access may be subject to certain conditions, e.g. the purchase of a ticket. The provision also makes clear that what matters is whether members of the public or a section of the public have access as a matter of fact, not whether they have permission to have access. For the purposes of the Bill, any covered place which is open to the air on at least one side is ‘open to the air’ (subsection (4)).

16. Public open place is also defined as including communal areas such as back gardens, common passages, closes, courts, stairs, back greens, gardens, yards or any other similar area whether or not such places are open to the air.

17. Subsection (2) provides that the Bill does not apply to agricultural land which is defined in subsection (3) by reference to the definition of agricultural land in section 86(1) of the Agriculture (Scotland) Act 1948. That is “land used for agriculture which is so used for the purposes of a trade or business”, “agriculture” is defined in section 86(3) of the 1948 Act. Under section 86(1) of the 1948 Act, the Scottish Ministers may designate land as “agricultural” for certain purposes even although it is not being used for agriculture. That land is not covered by the exemption until it is actually in use for agricultural purposes.

Section 3: Exceptions to offence

18. The existing law in the 1982 Act does not apply to blind people in charge of guide dogs and stockpersons in charge of working dogs. This section of the Bill retains these exceptions and in addition specifies that certain types of persons in charge of certain types of dog are also not subject to the Bill.

19. Subsection (1)(a) provides that a blind person in charge of a dog that is being used for that person’s guidance will not be subject to the Bill. In line with the existing law and unlike the position in relation to the offence of dog fouling in England and Wales, it is not necessary for the blind person to be registered blind.

20. Subsection (1)(b) sets out an exception for persons in charge of working dogs being used for the tending or driving of sheep or cattle. Subsection (1)(c) provides exceptions for members of the armed forces, Customs and Excise or the police force for any area. Subsection 1(d)
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provides an exception for persons in charge of rescue dogs. These exceptions apply only when
the dog is working.

21. Subsection (1)(e) provides an exception for a disabled person in charge of a dog that has
been trained to assist that person (referred to as an “assistance dog”) but only if the disabled
person has a physical impairment that affects their mobility, manual dexterity, physical co-
ordination or ability to lift, carry or otherwise move everyday objects. The effect of this is that
disabled persons with dogs to assist them will be subject to the Act unless the disability affects
their ability to clear up after their dog. The term “disabled person” has the same meaning as
given in section 1 of the Disability Discrimination Act 1995 (c.50), according to which “a person
has a disability … if he has a physical or mental impairment which has a substantial and long-
term adverse effect on his ability to carry out normal day-to-day activities”.

22. The assistance dog must be a dog that has been trained by a recognised body (the
definition of “assistance dog” is contained in section 15).

23. A “recognised body” is defined in section 15 as having the same meaning as in section
1(7) of the Law reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40), namely a body
which is entitled to describe itself as a Scottish charity because it has tax relief in relation to its
charitable income.

24. Subsection (2) provides an order-making power for the Scottish Ministers to add, remove
or amend the exceptions to the Bill. The order cannot be made until Parliament has approved a
draft of the order by resolution (this procedure is commonly known as the affirmative procedure
– see section 14(3)(b)). Adopting the affirmative procedure in this case will require the
Parliament to positively agree to any change to the exceptions to the offence.

Section 4: Authorisation by local authority of persons to issue fixed penalty notices

25. This section requires each local authority to authorise in writing at least one person to
issue fixed penalty notices. In practice, the local authority will be able to authorise as many
other persons as it considers necessary to carry out its functions in accordance with the Bill. The
section does not restrict the local authority to authorising employees; it could for example
authorise contractors to issue fixed penalty notices on its behalf.

Section 5: Issue of fixed penalty notices

26. Section 5 allows persons suspected of having committed an offence under the Bill to be
issued with a fixed penalty notice as an alternative to criminal prosecution.

27. Subsection (1) allows authorised officers of the local authority as well as police
constables to issue fixed penalty notices to a person who they have reason to believe has
committed an offence under the Bill.

28. Subsection (2) requires the fixed penalty notice to be issued as soon as is reasonably
practical. If the fixed penalty notice is not issued at the time of the offence then there is a
maximum time limit of 72 hours after the commission of the offence in which the notice can be issued.

29. Subsection (4) provides that a fixed penalty notice can be issued to a person by handing it or delivering it to the person, by leaving it at the person’s last known address or by sending it to them by post.

30. Subsection (5) provides that when a notice is sent by post it is deemed to take effect at the time of posting.

**Section 6: Form of fixed penalty notices**

31. Section 6(1) lists the information that a fixed penalty notice must contain. No style of notice is prescribed by the Bill.

32. While the Bill does not prescribe a style of notice, subsection (2) confers power on the Scottish Ministers to prescribe the form of fixed penalty notices thereby ensuring that the same form of notice is used throughout Scotland. Subsection (3) provides that an order made under subsection (2) can amend, remove or add to the list of information that is required to be included in a fixed penalty notice. Any order prescribing the form of fixed penalty notices will come into force unless the Parliament passes a resolution to annul it (negative resolution procedure – see section 14(3)(a)).

**Section 7: Restrictions on proceedings**

33. This section prevents criminal proceedings being brought for the offence of dog fouling against the person named in the fixed penalty notice unless that person requests a hearing before the expiry of the “period for paying”. The section also provides that criminal proceedings may be brought where a fixed penalty notice has been withdrawn under section 12. The period of paying is defined in section 15 as being the period of 28 days beginning with the day after the day on which the fixed penalty notice was issued. The number of days in the period for paying may be amended by an order made by Scottish Ministers which is subject to negative resolution procedure (see section 15(1) and (2))

**Section 8: Request for hearing**

34. This section provides that a person who has been issued with a fixed penalty notice may request a hearing in respect of the offence. Any such request must be in writing and must be posted in sufficient time to arrive with the local authority within the 28-day period mentioned above. When sent by post, service is effected at the time when the notice would arrive in the normal course of post. Accordingly, if a notice arrives with the local authority outwith the period for paying it may be valid depending on when it was posted.

35. Subsection (4) makes clear that when a hearing is requested within the required timescale the fixed penalty is no longer payable. An authorised officer must provide the procurator fiscal with details of the request for a hearing. The procurator fiscal will treat the request in a similar manner to a complaint from the police and decide whether to initiate district court or sheriff
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court proceedings. In the event of a conviction following such proceedings the offender would be liable a fine of up to £500 (see section 1(2)).

Section 9: Amount and payment of fixed penalty

36. Subsection (1) provides that the fixed penalty will be payable to the local authority in whose area the offence was committed. Subsection (2) sets the amount of the fixed penalty at an amount that is equal to 20% of level 1 on the standard scale. Level 1 is currently £200, making the penalty to be paid £40. Specifying the level of the fixed penalty by reference to a percentage of level 1 on the standards scale ensures that the fixed penalty will increase in line with changes in the standard scale without the need for any amendment to the Bill. The percentage can be changed by the Scottish Ministers under subsection (2) by an order subject to negative resolution procedure (see section 14(3)(a)).

37. Subsection (3) provides that fines received by the local authority are treated as if the fixed penalty were a fine imposed by a district court. Section 23 of the District Courts (Scotland) Act 1973 provides that fines imposed in the district court accrues to the local authority. This provision therefore means that the local authority retains all money received in respect of payment of fixed penalties.

Section 10: Increase in fixed penalty

38. Section 10 provides that where a fixed penalty has not been paid on time and no request for a hearing has been received, the amount of the fixed penalty will be automatically increased by 10% of level 1 on the standard scale. Currently this means an additional £20, making the amount of penalty payable £60. This section also gives the Scottish Ministers power by order to change the percentage increase. This order-making power is subject to negative resolution procedure (see section 14(3)(b)).

Section 11: Recovery of unpaid fixed penalties

39. Section 11 deals with the recovery of unpaid fixed penalties. After the expiry of 28 days the local authority is able to enforce the unpaid penalty as increased under section 10 as if it were an extract registered decree arbitral. In practice this means that the unpaid penalty can be recovered in the same way as a sum of money due under a civil court decree. There is no need for any application to the sheriff court for any orders.

Section 12: Withdrawal of fixed penalty notice

40. Under this section an authorised officer and a police constable can withdraw a fixed penalty notice if that person determines either that the notice should not have been issued or that it should not have been issued to the person who is named in the notice. A local authority officer can only withdraw notices issued by the local authority and only the police have the power to withdraw notices issued by police constables. A fixed penalty notice might be withdrawn, for example, if it transpires that there has been a mistake as to the identity of the alleged offender and the fixed penalty notice should not have been issued to the person who is named in the notice. Another situation where a fixed penalty notice may be withdrawn is where it was issued
to a person and it was then later discovered that the person had consent from the owner and occupier of the land (section 1(b)).

Section 13: Effect of Act on byelaws

41. Under this section any existing byelaws in respect of an offence of dog fouling the same as that under the Bill will cease to have effect when the Bill comes into force. This includes byelaws made by local authorities and any made under private legislation. In addition, any byelaws in respect of the offence of dog fouling under the Bill that are made after the Bill comes into force shall not have effect in so far as they apply to places to which the Bill applies.

Section 14: Orders

42. Subsection (1) provides for the powers given to the Scottish Ministers to make orders under the Bill to be exercisable by statutory instrument.

43. Subsection (3)(a) provides that any statutory instruments made in respect of the form of fixed penalty notices (section 6(2)), the amount of the penalty (section 9(2)), the amount of the increase in the penalty (section 10) and the period for paying (section 15(2)) are subject to negative resolution.

44. Subsection (3)(b) provides that any statutory instruments made in respect of section 3(2) (power to amend exemptions to offence) are subject to affirmative resolution.

Section 15: Interpretation

45. Subsection (2) provides the Scottish Ministers with an order-making power to alter the 28-day period for paying. The order-making power is subject to negative resolution procedure (see section 14(3)(a)).

Section 16: Consequential repeal of section 48 of the Civic Government (Scotland) Act 1982

46. This section repeals section 48 of the Civic Government (Scotland) Act 1982, which sets out the current offence of dog fouling.

Section 17: Amendment of the Criminal Procedure (Scotland) Act 1995

47. Section 17 amends section 302 of the 1995 Act so that the procurator fiscal may not issue a conditional offer or a “fiscal fine” in respect of the offence of dog fouling if a fixed penalty notice has already been issued. This means suspected offenders will only have one opportunity to discharge their liability for the offence through the payment of a fixed penalty.

Section 18: Short title and commencement

48. Subsection (2) provides that the Act will come into force six months after the date of Royal Assent. This period is to allow for the local authorities, and the police to put into place the required administrative systems (and staff resources).
FINANCIAL MEMORANDUM

INTRODUCTION

49. The main costs from the provisions of this Bill relate to the extra burdens placed on local authorities with some minor costs being attributed to the Procurator Fiscal Service.

50. However, the aim of the Bill is to reduce the number of times the offence occurs and not to increase the number of prosecutions. The expectation is that offending and therefore enforcement costs should diminish over time.

COSTS ON THE SCOTTISH EXECUTIVE

51. It is not anticipated that the provisions should impose any direct costs on the Scottish Executive.

COSTS ON LOCAL AUTHORITIES

Staffing costs

52. The Bill imposes no requirement on local authorities to recruit additional staff. Local authorities may designate existing employees as officers for the purposes of the Bill. It is not expected that the numbers involved will necessitate new posts being created. Local authorities will be required to provide training to these officers. The Bill also allows the local authority to contract out enforcement to private companies.

Administration costs

53. There will be an administration cost for local authorities to bear in relation to the printing of fixed penalty notices and the adaptation of IT systems where required. It is not possible to estimate the latter, while the figures provided by a local authority in connection with fixed penalty notices for litter indicate the former may amount to around 9 pence per notice. Notices are produced in books of 30 at a cost of £2.70 per book. Allowing for 48 books per local authority area, the cost per authority is around £130. Overall, the anticipated cost for all 32 local authorities would be around **£4,150**.

Enforcement costs

54. It is difficult to predict with any degree of accuracy the number of fixed penalty notices that will be issued as a result of the new provisions in the Bill. One method of doing this is to look to other jurisdictions for indications. The resulting estimates for enforcement costs taken from the following paragraphs are presented at the end of the Memorandum in Table 1 as ranges of values from the minimum anticipated to the maximum.
55. It is anticipated that there will be a minimal cost to the local authority when enforcing unpaid penalties. Since these are enforced in a like manner to a decree arbitral, enforcement costs are added to the total due.

56. It is also anticipated that there will be a cost implication for the local authority arising from hearings being requested. Figures provided by a local authority indicate that a staff member would spend approximately 3 hours preparing the paper work to enforce an unpaid fixed penalty. Assuming an annual salary of £17,500 (the average for the level of staff involved) and allowing for staff overheads, this would be a cost of approximately £50 per hearing.

Estimating the number of fixed penalty notices issued

57. To predict the usage of fixed penalty notices, consideration has been given to volumes in other jurisdictions.

58. Gateshead Council in England has implemented the Dogs (Fouling of Land) Act 1996, enabling them to issue fixed penalty notices for the offence of dog fouling. Over the last 4 years Gateshead Council has issued an average of 21 fixed penalty notices per year\(^1\). The population of Gateshead Council is approximately 200,000 people.

59. Based on the population of Scotland, this can be grossed up to a national figure of 525 fixed penalty notices per year that may be issued in Scotland each year.

Estimating the number of unpaid fixed penalty notices per year.

60. Figures provided by the Department of Environment, Food and Rural Affairs (DEFRA) show that in the last 3 years 3,208 fixed penalty notices were issued throughout England under the Dogs (Fouling of Land) Act 1996 of which 2,734 were paid. This produces a total of 474 (14.8%) unpaid for the last 3 years. These are shown in the table below.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of penalties issued</th>
<th>Number of penalties paid to local authorities</th>
<th>Unpaid</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997-98</td>
<td>297</td>
<td>282</td>
<td>15</td>
</tr>
<tr>
<td>1998-99</td>
<td>1,373</td>
<td>1,183</td>
<td>190</td>
</tr>
<tr>
<td>1999-00</td>
<td>1,538</td>
<td>1,269</td>
<td>269</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>3,208</strong></td>
<td><strong>2,734</strong></td>
<td><strong>474</strong></td>
</tr>
</tbody>
</table>

61. It is not possible to make a national comparison using the figures provided by DEFRA, as not all English and Welsh local authorities are currently enforcing the 1996 Act and DEFRA only have a record of the overall figures.

62. However it is significant that grossing up the Gateshead figures for the number of notices issued by population to produce a total for England alone would produce a national figure of around 5,000. This figure is significantly higher than the DEFRA national figure. The

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\(^1\) Information provided to SPICe by Gateshead Council.
difference reflects the fact that many councils have not implemented the Act. This lends some credence to the indications given by the Gateshead figures.

Estimating the number of unpaid fixed penalty notices that would require to be enforced as a decree arbitral

63. Under the Bill all unpaid fixed penalty notices would be enforced as a decree arbitral. Using the unpaid percentage from above in conjunction with the estimated number issued in Scotland would give a figure of **78 fixed penalty notices per year which would not be paid**. As indicated earlier at paragraph 7 this is cost neutral, with enforcement costs being recovered directly from defaulters.

Estimating the number of offenders who request hearing leading to a trial.

64. Statistics from the Scottish Executive in relation to fixed penalty notices issued for stationary vehicle offences\(^2\) showed that in the year 2000, of the 185,987 fixed penalty notices issued only 257 offenders (0.14\%) requested a hearing.

65. Using this as a comparative figure for Scotland would suggest that, in relation to the estimate of 525 fixed penalty notices issued per year, the average number of hearings expected would be less than one. For the purpose of costing, it is assumed that of the 78 unpaid notices per year (from paragraph 63), 10\% will result in hearings being requested. Estimates in this memorandum are thus based on there being **8 hearings per year**.

Cost of proceedings in instances where a hearing has been requested

66. It is estimated that each hearing would last for \(\frac{1}{2}\) hour.

67. The following figures are based on information supplied for other bills by the Scottish Court Service and the Procurator Fiscal Service. It is estimated that each hearing will cost £220. In addition to this there would be a cost of approximately £40 on the Procurator Fiscal Service for the preparation of papers for the hearing.

68. This gives a total of **£260 per hearing**.

Summary

69. The figures in this memorandum produce a total cost of **£6,630** per annum in total as the costs for implementing the Bill as shown in the following table. The actual amount could vary upwards from this for some of the individual costs and for the purposes of this memorandum figures have been provided to show what the total cost would be if these costs were increased by 100\%. These are also shown in the table below.

70. In addition there will be some initial start-up costs occasioned by any need to adapt IT systems, but these costs are not quantifiable.

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<table>
<thead>
<tr>
<th>Admin costs</th>
<th>Expected costs</th>
<th>Maximum*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Printing of notices</td>
<td>£4,150</td>
<td>£4,150**</td>
</tr>
<tr>
<td>Staff costs for arranging a hearing</td>
<td>£400</td>
<td>£800</td>
</tr>
<tr>
<td><strong>Hearings</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cost of hearing</td>
<td>£2,080</td>
<td>£4,160</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>£6,630</strong></td>
<td><strong>£9,110</strong></td>
</tr>
</tbody>
</table>

* The maximum costs are based on applying a 100% margin of error of usage to the expected costs.
** This figure remains constant as the number of notices printed is 46,000 and is considered to be sufficient for the purposes of the Bill.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

71. None are anticipated.

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

72. On 11 June 2002, the Presiding Officer (Sir David Steel) made the following statement:

“In my view, the provisions of the Dog Fouling (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
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DOG FOULING (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

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